SUPREME COURT OF SEYCHELLES

Reportable/ Not Reportable / Redact
[2019] SCSC 388
CS 96/2017

In the matter between:

MARIE THERESE BRUTUS **Plaintiff**

JOHN BRUTUS

VINCENT BRUTUS

JESS BRUTUS

SAMANTHA WILLIAM NEE BRUTUS

DOROTHY FREMINOT NEE BRUTUS
(rep. by Bernard Georges)

and

SAMUEL BRUTUS **Defendant**
(rep. by S. Rajasundaram)

Neutral Citation:	*Brutus and Ors v Brutus* (CS 96/2017) [2021] SCSC 388 (30th June 2021).
Before:	Pillay J
Summary:	Donation Deguisee
Heard:	13th November 2018 and 21st July 2020
Delivered:	30th June 2021

ORDER

[1] Judgment is entered in favour of the Defendant.

[2] In view of the nature of the action, each side shall bear their own costs.

JUDGMENT

PILLAY J

[1] The Plaintiffs in the matter claims that a transfer of property Title C564 by the deceased to the Defendant was a donation deguisee.

[2] The Plaintiffs' claim is that the first Plaintiff is the wife of the deceased, Maxwell Brutus, who passed away on 23rd December 2013. The second, third, fourth, fifth and sixth Plaintiffs as well as the Defendant are the children of the deceased and his heirs entitled to a reserved portion of his estate.

[3] The Plaintiffs claim that the deceased transferred to the Defendant Title C564, a property situated at Anse Boileau, Mahe measuring 10711 square metres for the sum of SCR 10, 000.00 in 2004. They further claim that the said transfer was made with the intention of depriving the Plaintiffs of their lawful share in the estate of the deceased.

[4] The Plaintiffs claim that the said transfer was a disguised donation of the said Title C564 in favour of the Defendant.

[5] The Plaintiffs seek an order from the Court

a) *declaring that the transfer of Title C564 by the late Maxwell Brutus to the Defendant was a disguised donation of the Title to the Defendant;*

b) *that the Defendant return the value of the property in excess of the disposable portion to the Plaintiffs.*

c) *to order the Defendant to pay the Plaintiffs their rightful shares of the estate of the said late Maxwell Brutus.*

[6] The Defendant denied the claims and raised a plea in limine that the Plaintiff's action is time barred. By way of a ruling dated 7th May 2018 the plea in limine was dismissed.

[7] On the merits the Defendant denied the claims of the Plaintiffs and put the Plaintiffs to proof of all the claims. The Defendant claimed that the Transfer was for a valuable sale price that was paid and thus remains a bona fide purchaser.

[8] The evidence of the Plaintiffs is that John Brutus is the son of the deceased. Also children of the late Maxwell Brutus is Jess Brutus, Sandy Brutus, and Derothy Freminot nee Brutus,

[9] The evidence of the Defendant is that he paid his father the sum of SCR 10, 000.00 in front of Mr. Jacques Hodoul before whom the transfer for C564 was signed. The sale was executed in 2004. In 2002 his father gave him permission to build on the land. In 2007 he moved into his house. At the time the deceased was living at La Gogue, on an agricultural plot of land leased from the Government that now the third Plaintiff occupies.

[10] The Defendant explained that on his return from studies in Germany the land was abandoned. His father was going to sell the land to someone else. He offered the land to the Defendant who asked to name his price and he would pay.

[11] Counsel for the Plaintiffs submitted that the whole estate of the deceased comprised of parcel C564 only. Other than restating the evidence and the law the submissions of the Plaintiffs were of no assistance since there was no argument as to how the law applied to the evidence led by the Plaintiffs to prove that the deceased had made a disguised donation to the Defendant and the value of the property that was to be returned the estate for redistribution.

[12] Counsel for the Defendant submitted that the law of disguised donation is taking shape in our jurisdiction since the last three to four years wherein all genuine, valid transactions of sale of property by the owner to one of his or her children are declared to be a disguised donation.

[13] It was his submission that the law of disguised donation is a double edged sword that needs to be handled safely otherwise all the transactions are one day declared to be invalid and the lawful transactions of sale of properties by the owner become null and void, defeating the very law of right to sell, right to purchase and other relevant laws, sale of properties in our jurisdiction.

[14] Counsel submitted that the suit was time barred for the transfer was effected on 17th May 2004. He submitted that in line with Article 2265 of the Civil Code of Seychelles the suit should have been filed in 2014.

[15] In defining disguised donation counsel submitted that it is an exhaustive matter which needs to be addressed with careful approach, differing from case to case.

[16] It was his submission that the Plaintiffs abandoned the deceased and severed connections with him for several years leaving the Defendant to look after him. It was his submission that the transaction was done in good faith and for valuable consideration hence in his opinion the case of **Reddy** and the law of disguised donation was not applicable to the fact of this case.

[17] Counsel submitted that the valuation from Cecile Bastille should be disregarded since she did not visit the property but rather came to the figure by looking at pictures on GIS, survey plan etc… It was counsel's submission that the valuation of Nigel Roucou shows the true value of the land since "he visited the property and walked over the slope terrain of the land thoroughly and arrived at the valuation."

[18] The Plaintiffs' counsel identified the issues as follows:

(1) Was the transfer of title C564 by the deceased to the Defendant a disguised donation?

(2) If yes, are the Plaintiffs heirs of the deceased?

(3) Are the second, third, fourth, fifth and sixth Plaintiffs entitled to a share in the estate of the deceased?

(4) What is the value of the property in excess of the quotité disponible to be returned to the heirs?

[19] The Defendant's counsel identified the issues as follows:

(1) Whether the Plaint claim is not time barred by virtue of Article 2265.

(2) Whether the registered transfer of the title C564 by the late Maxwell Brutus to the defendant is a disguised donation.

(3) If the answer is affirmative, whether the Plaintiffs are entitled to their shares on the value of the property in C564 to be paid by the Defendant.

[20] These issues can be narrowed as follows:

(1) Who may make a claim of a disguised donation?

(2) Was the transfer of Title C564 by the deceased to the Defendant a disguised donation?

(3) If so, who is entitled and what is the value of their share in the estate?

[21] Donation deguisee was defined in **Contoret v Contoret [1971] SLR 257** as a "sale [that] was in fact a disguised donation made by [the deceased] to the defendant, one of [the deceased] children, with the object, concerted between them both, of depriving the other children of their prospective rights as 'heritiers reservataires' in [the deceased's] succession".

[22] In effect the Plaintiffs have to show on a balance of probabilities that they are reserved heirs and the donation to the Defendant deprived them of their fair share to the succession in accordance with Article 913 of the Civil Code of Seychelles.

[23] Furthermore Article 921 of the Civil Code provides as follows:

> *The reduction of dispositions inter vivos shall only be demanded by those in whose favour the law has provided the reserve, by their heirs or assigns; donees, legatees and creditors of the deceased shall not demand it nor shall they benefit from it.*

[24] This was succinctly explained by Chief Justice Twomey, as she then was, in the case of **Reddy & Ano. v Ramkalawan (CS 97/2013) [2016] SCSC 31 (26 January 2016)** as follows;

> *[21] An owner of property is not precluded by law from selling his land or giving it away. A disguised sale is also valid if the sale respects the conditions of form, the rules of contract and public policy (see Article 931, Civil Code of Seychelles). Similarly the* de cujus *can sell or make a gift to an heir - as long as that sale or the gift does not so diminish the estate that the reserved rights of the*

heirs are not satisfied. These rules are distilled from the provisions of the following articles of the Civil Code:

"Article 913: Gift inter vivos or by will shall not exceed one half of the property of the donor, if he leaves at death one child; one third, if he leaves two children; one fourth, if he leaves three or more children; there shall be no distinction between legitimate and natural children except as provided by article 915-1. Nothing in this article shall be construed as preventing a person from making a gift inter vivos or by will in the terms of article 1048 of this Code.
Article 918 : The value of full ownership of the property alienated, whether subject to a life annuity or absolutely or subject to a usufruct in favour of one of the persons entitled to take under the succession in the direct line, shall be set against the disposable portion; the excess, if any, shall be returned to the estate. This calculation and return shall not be demanded by other persons entitled to take under the succession in the direct line who have agreed to the alienation, and in no circumstances by those entitled in the collateral line.

Article 920: Dispositions either inter vivos or by will which exceed the disposable portion shall be liable be reduced to the size of that portion at the opening of the succession.

Article 1048 (1). The property of which fathers and mothers are at liberty to dispose may be given by them, as a whole or in part, to one or more of their children, whether by an act inter vivos *or by will, subject to their obligation to pass that property on to the children born or to be born of the said donees in the first degree only.*
(2). It shall also be lawful for any person by deed inter vivosor by will to give, devise or bequeath to his legitimate child the whole or part of the reserved portion accruing to such legitimate child or to give, devise or bequeath to his natural child the whole or part of the portion which would have accrued to such child upon intestacy...

*[22] Article 918 creates an irrebuttable presumption in favour of disinherited heirs – a donation to one entitled to succeed to the exclusion of others who are also entitled to succeed shall be reduced if it exceeds the disposable portion (*quotité disponible*). Nothing more, nothing less. It is nigh impossible to disinherit one's child under Seychellois law.*

[23] ... The fact that a donation is made to an heir in excess of the disposable portion does not amount to a fraud, it only amounts to a disinheritance disguised

as a donation. That is the meaning of donation deguisée *in this case. Hence, the question of fraudulent donation or its proof where it concerns disinherited heirs does not arise and is completely immaterial. To that extent the case of* Pragrassen v Vidot *(2010) SLR 163 was wrongly decided. This is rightly so since it is not the deed itself that is being attacked but the alienated inheritance.*

[24] The question that follows is the nature of the inheritance that has been alienated. As I have already explained it is the value of the donation that matters in actions such as the present one. There is therefore no question of returning the immoveable property itself to the hotchpot but rather it is the value of the property in excess of the quotité disponible *that must be returned.*

[25] The application of the provisions of Article 913 (supra) to the particular circumstances of this case, that is, where there are three children, dictates that the gift inter vivos *should not have exceeded one quarter of the property of the* de cujus. *The three quarters transferred in excess has to be brought back into the hotchpot for redistribution into three equal shares. The value of the property now becomes significant.*

[26] Mr. Valentin's valuation of the property in this respect must be utilised in the light of Article 922 of the Civil Code which provides:
"The reduction shall be made by taking into account the total asset value of all the property existing at the death of the donor or the testator.
After a deduction of the debts, the assets given by way of a gift inter vivos according to their condition when the gift was made and their value at the opening of the succession are added together. If the property has been alienated, its value at the time of the alienation and, if there is subrogation, the value of the converted property is taken into account when the succession opens."
The disposable portion of which the deceased was entitled to dispose shall be calculated on the basis of all these assets having regard to the class of heirs whom the deceased has left."

[25] With the above in mind the first Plaintiff, as the spouse of the deceased, is not a reserved heir in line with Article 913 and 921 of the Civil Code of Seychelles. In fact the Plaintiff's counsel relied on the case of **Reddy** above and offers no other authority to support any claim by the first Plaintiff to a share in the deceased succession on the basis of donation deguisee. In the circumstances the claim by the first Plaintiff is dismissed leaving the

second to sixth Plaintiffs as reserved heirs with a valid claim under Article 921 of the Civil Code for a share of the estate.

[26] Now is there a donation by the deceased to the Defendant in excess of the disposable portion liable to be reduced?

[27] Indeed it is admitted in paragraph 4 of the Defence that "on 17 May, 2004, the deceased transferred to the Defendant Title C564, a property situated at Anse Boileau, Mahe, measuring 10711 square metres, for the sum of R 10, 000.00."

[28] The Plaintiffs provided an evaluation by Cecile Bastille a quantity surveyor who gave an estimated evaluation since it was not possible for her to visit the property. In her estimation in 2004 the property was valued at SCR 764, 000.00 whereas in 2017 the market value was estimated to be SCR 2, 700, 000.00.

[29] The Defendant's quantity surveyor valued the property to be SCR 163, 500.00 in 2004. He explained that in order to get to that figure he valued the property as it is currently and then he took the value and then devalue it twice because the rupee lost its value in 2008 by twice and then worked his was backwards again until 2004. Once he got that figure he compared it to land that had been exchanged in 2004. Knowing that land had been exchanged at 90 or 100 rupees per square metre he did the comparison to see if it makes sense.

[30] Going through the Defendant's expert reasoning I am not sure I understand why he went about the valuation the way he did. Furthermore he stated that after he had used the formula he still opined that the value was a lot less than SCR 10, 000.00. It beggers belief how one can use a formula to come to conclusion but still disagree with the result of the formula of his choice. For those reasons I decline to accept the valuation given by the Defendant's expert.

[31] In line with Article 922 of the Civil Code of Seychelles, the Court has to consider "the total asset value of all the property existing at the death of the donor" after the deduction of debts. Any asset given by way of gift "according to their condition when the gift was made and their value at the opening of the succession" is then added to the rest of the estate.

[32] In order to find the share due to each reserved heir then, the Court needs to calculate the value of the whole of the estate before deducting the disposable portion leaving the reserved portion for distribution. The question at this point therefore is; what is the value of the deceased estate; was there any other asset in the succession; was there any debt?

[33] There is no pleading that the property C564 is the only property in the estate of the deceased. But Samantha William testified that there was no other property but for the Anse Boileau property when the deceased passed away and nor was there any money left by the deceased.

[34] However the evidence shows that there was another plot of land on lease from the government of Seychelles which the third Plaintiff, Vincent, took over around 2019. There is no evidence as to the nature of the lease and leaves open the question as to whether this lease should form part of the estate, and how if at all, for the purposes of calculating the disposable portion of the deceased estate.

[35] Both sides produced valuations for the property C564 only. In light of evidence that there may have been at least one other asset in the estate this Court cannot determine the value of the gifted property in relation to the value of the whole property of the deceased in order to ascertain whether this falls foul of article 918 of the Civil Code of Seychelles. As it is the plaintiff who asserts, the onus is on him to prove that element. I find that the plaintiff has failed to do so.

[36] Accordingly judgment is entered in favour of the Defendant and the Plaintiffs' claim is dismissed

[37] In view of the circumstances of this case each side shall bear their own costs.

Signed, dated and delivered at Ile du Port on ..30th June 2021

Pillay J